No. 3048

United States
Circuit Court of Appeals
For the Ninth Circuit.

DANIEL M. KELLY,
Plaintiff in Error,
vs.
UNITED STATES OF AMERICA,
Defendant in Error.

Brief of Defendant in Error

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BRIEF OF DEFENDANT IN ERROR.

In this case we have not been favored by counsel for plaintiff in error with a copy of his brief until this the 8th day of February, 1918, exactly thirteen days prior to the date on which the cause is to be argued. This is directly in violation of Rule 24 of this Court, but despite such a violation of the rules of this Court we do not insist on a dismissal, for the question involved is one which we feel is of such importance that it should be settled by an appellate court. For if conduct such as that indulged in by plaintiff in error is not an obstruction of justice, then liti-

gants and attorneys should be generally apprised of such fact so that those who now refrain from conduct such as that complained of, by reason of a feeling that it is not proper, may be at liberty to do so without a feeling of wrongdoing. It is needless to remark that, regardless of the ultimate outcome of this case, the majority of litigants and attorneys will never indulge in the actions of plaintiff in error which ARE the basis of this case because of a feeling that such actions are not what men of high ideals indulge in.

Kelly is charged with having, in the course of a certain criminal case then on trial, during an adjournment of court, visited and conversed with certain members of the jury, then impaneled to try said criminal cause, with a view of improperly influencing such jurors in their deliberations and determination of said cause; that he during said trial, with such purpose in mind, did knowingly furnish and give to one of said jurors liquid refreshments in a bar-room; and likewise did visit and converse with another juror in said case, relative to certain legislation that juror was desirous of having enacted by the legislature which was then in session.

With the knowledge we have of the facts connected with said charges as disclosed by the record we have waited long and patiently for the brief of plaintiff in error so as to be enlightened with his views and discover what can be said in his behalf in urging upon this court a reversal of the judgment.

It is to be observed preliminarily that plaintiff in error has not relied in his brief upon his assignments of error filed with his petition for a writ of error. Specification of error number 2 (Brief p. 4) resembles somewhat his assignment of error number 5 (Trans. p. 309). Hence plaintiff in error must be considered as having abandoned his other assignments of error appearing in the record and cannot change the questions to be considered by this court under the guise of his now carefully thought out "Specifications of Error," to be found on page 4 of his brief.

The rules of this court and the decisions are unanimous in holding that error not assigned cannot be urged on a writ of error, and will be disregarded.

Rules of This Court 11, 24;
Walton v. Wild Goose M. Co., 123 Fed. 209, 211;
Stillwagon vs. B. & O. R. Co., 159 Fed. 97;
Russel v. Bank, 162 Fed. 868, 871.

Passing then to the only question before us, viz., Did the court err in adjudging plaintiff in error to have been guilty of contempt of court we will answer the questions argued in the order they are presented by plaintiff in error.

The verification of the information filed with the court is alleged to be insufficient, but the abandonment of assignment of error number 1 (Tr. p. 307) by plaintiff in error precludes him from now raising the question here. In addition to which the cases cited on page 5 of the brief do not

appear to be from Federal Courts. The proceeding herein was in the nature of a petition or information and upon it an order to show cause issued, no warrant was ever asked for or issued or attempted to be served. We submit the verification is proper and sufficient, and under the latest decision the question is definitely settled that the information need not be verified positively. See:

> Weeks vs. United States, 216 Fed. 292; 54 L. R. A. (N. S.) 1915 B, at page 651 and cases cited in note.

We take it that the well known rule that appropriate relief will be granted upon the allegations of a pleading, regardless of the wording of the prayer, needs no citation of authority to sustain it, hence the criticism of the prayer in the information herein falls. However it is to be borne in mind that courts have the inherent right to punish contempts, and the present contempt is one that not only arises from that right of courts but also from the express provisions of

Section 268 Judicial Code of U. S.

In other words, when the court is apprised of the fact that a contempt has been committed, and a hearing is had, it is within the power of the court to punish therefor. We submit that the question of the sufficiency of the information is not before this court and should be disregarded because of plaintiff in error's abandonment thereof.

Plaintiff in error indulges in a long and labored discussion of the testimony as he sees it, but it is to be observed he has with great care only quoted such portions of the testimony as would serve to support his argument. In all briefs it is hard for a person who is contending for the insufficiency of the evidence to give a full and complete resume of the evidence as it was introduced at a hearing in the lower court, and in the case at bar we find the counsel for plaintiff in error are no exception to the general rule. The brief of plaintiff in error contains many pages of isolated parts of the testimony introduced before the lower court which tend to support his contention that there was no sufficient proof of the acts charged. But he has omitted the direct and positive testimony of witnesses who gave a different version of the happenings as they occurred. Knowing as we do that this Court will read with care the entire record we do not presume upon the patience of the court to paint a word picture that is glowingly in support of our views in the matter and ask this court to read it over and then turn to the record to ascertain what the exact condition of the record is. As an aid in ascertaining what the record discloses as to the evidence adduced on the hearing we respectfully refer to the complete and comprehensive review of the evidence that was made by the trial judge and which is to be found in the opinion of the lower court (Transcript pp. 283-303). In that opinion is to be found the gist of all the evidence,

together with the court's view of it and the credibility given the various witnesses. The opinion of the court contains its findings and such findings cannot be reviewed by an appellate court when there is any evidence to sustain them.

Schwartz v. U. S., 217 Fed. 866.

The Gompers Case, 221 U. S. 418, 440, is one wherein was involved only the question of a contempt arising out of the disobedience of an injunction, and in that case there were several counts. In the case at bar there is one charge, viz., that Kelly did certain things to obstruct the due administration of justice, which in no wise resembles the charges in the Gompers case, *supra.*

The citations of plaintiff in error on the question of intent are cases predicated upon record showing a different state of facts than we have before us. We submit that in a consideration of this case it is abundantly shown by the evidence that the acts charged were committed by plaintiff in error and the lower court very properly found from the evidence and all the circumstances appearing from the evidence that plaintiff had the intent charged. This was the proper thing for the lower court to do. The question of whether a contempt has or has not been committed does not depend on the intention of the party, but on the act done.

Merrimac R. S. B. v. Clay Center, 219 U. S. 527;
Wartman v. Wartman, Fed. Cases, 17, 210;
U. S. v. Southern &c. Co., 207 Fed. 434.

In conclusion we beg to observe that taking the case now before us that it is one wherein the allegations of the petition are amply sufficient to apprise the contemnor fully of the charges against him, and that is all that is required,

Schwartz vs. U. S., 217 Fed. 866

and the record shows that the charges are sustained by good and sufficient evidence and the lower court was justified in making the findings it did and entering the judgment pronounced upon contemnor, and the judgment should be affirmed.

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